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NTSB Order No. EA-3840

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of March, 1993

JOSEPH M. DEL BALZO, Acting Administrator, Federal Aviation Administration, Complainant, v. MICHAEL JAY FLOWERS, Respondent.	Docket SE-11305

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge William R. Mullins issued in this proceeding on December 13, 1990, at the conclusion of an evidentiary hearing.[1] By that decision, the law judge affirmed in part[2] an order of the Administrator, suspending respondent's

[1]An excerpt from the hearing transcript containing the initial decision is attached.

[2]The law judge reduced the suspension ordered by the

commercial pilot certificate for 90 days on allegations that he violated sections 91.9 and 91.79(c) of the Federal Aviation Regulations (FAR), 14 C.F.R. sections 91.9 and 91.79(c), as a result of two incidents involving respondent's alleged operation of a Cessna 172 aircraft over private residences at altitudes of less than 500 feet.[3]

At the time of the low flights, respondent was the only pilot employed by Dixie-Lynn Aerial Photography, a company which engages photographers to photograph large estates from the air, and then offers the aerial photographs to the homeowners for purchase. As to the two incidents in question, homeowners actually filed complaints with the Federal Aviation Administration, claiming that the flights were well below 500 feet. When the owner of Dixie-Lynn Aerial received a letter of investigation from the FAA, he called respondent, and he

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Administrator from 180 days to 90 days. The Administrator has not appealed the modification of sanction.

[3]FAR §§ 91.9 and 91.79(c) provided at the time of the incidents as follows:

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.79 Minimum safe altitudes; general.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes....

(c) Over other than congested areas. An altitude of 500 feet above the surface except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure."

concluded from that conversation that respondent had been the pilot of the aircraft, which had been identified by its type, color, and aircraft registration number, by the complaining witnesses.

Respondent, in his answer to the complaint, did not deny that he was the pilot of the aircraft, and he admitted in his testimony at the hearing that he was operating the aircraft in the general vicinity of the witnesses' homes, on the days in question. However, he denies that he operated the aircraft at impermissibly low altitudes. Respondent also produced an expert witness who questioned the accuracy of the altitudes claimed to have been observed by the witnesses. The law judge nevertheless found in favor of the Administrator's witnesses, and concluded that the Administrator had met his burden of proof.

Respondent raises numerous issues on appeal. He argues that there was insufficient evidence to establish that he was the pilot in command of the offending aircraft, and he claims that, in any event, the evidence failed to prove that the aircraft was actually below the altitude minimums set forth in the FAR.[4]

[4]Respondent also claims that the credibility of the percipient witnesses was cast in doubt because they discussed their observations with each other and with FAA counsel prior to the hearing. This claim is spurious. Apparently, after having dinner with FAA counsel the evening before the hearing, the witnesses left the restaurant, which was in a hotel, and then compared the difference in height between the hotel, as they observed it from the street, with their previous observation of respondent's aircraft from their respective homes. In the Board's view, this discourse with counsel was mere trial preparation. There is not a scintilla of evidence to suggest that FAA counsel in any way attempted to alter the witnesses' testimony, or that any witness actually altered their testimony.

Respondent also asserts that he was prejudiced by the law judge's consideration of the testimony of his former employer, claiming that he was deprived of his right to cross-examine the witness because it was taken by telephone, and that he was compelled to take the stand and incriminate himself in order to rebut that testimony. Respondent contends that he was also prejudiced by the admission of the testimony of a Mr. Green, because he did not receive written notice that this witness would testify until November 29, 1990, when the hearing was scheduled to begin on December 13, 1990.

The Administrator has filed a brief in reply, urging the Board to deny the respondent's appeal and affirm the law judge's initial decision and order. Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, as modified by the law judge's initial decision. For the reasons that follow, we deny respondent's appeal.

Did the law judge's consideration of telephone testimony create prejudicial error?

The law judge's consideration of telephone testimony in this proceeding must first be addressed, since much of respondent's other arguments are contingent on our resolution of this issue.

According to the transcript of the proceedings, shortly

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before the hearing, FAA counsel apparently learned that respondent's former employer was unwilling to attend the hearing, because it was to take place over 100 miles from his home, and in another state.[5] FAA counsel attempted to arrange a deposition, but respondent's counsel objected to travelling out of state and at respondent's expense. FAA counsel then decided to present the testimony at the hearing by telephone.

Respondent objected to the consideration of telephone testimony, arguing to the law judge that because the witness would not be present in the hearing room "to look at our maps" (TR-6), and because telephone testimony is not provided for under the Federal Rules of Evidence, the testimony should be excluded.

The law judge ruled that the telephone testimony would be allowed over respondent's continuing objection, noting that the Board's Rules of Practice do not preclude the taking of such testimony in this fashion.[6]

A person who identified herself as a notary public for the state of Missouri identified Mr. Lanier for the law judge by looking at Mr. Lanier's driver's license. (TR-68). She indicated on the record that she had administered an oath and that Mr. Lanier had sworn that he would testify to the truth.

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[5]According to the transcript, FAA counsel apparently believed the witness was beyond the Board's subpoena power.

[6]The Federal Rules do not control the admissibility of evidence in Board proceedings. Administrator v. Trier, 2 NTSB 379, 380 (1973). Moreover, the Board has previously found sworn telephonic testimony, subject to questioning by respondent's counsel, acceptable. See e.g., Administrator v. Peretti, NTSB Order No. EA-3647 (1992).

(TR-70). Respondent offers no valid reason to doubt these assertions.

Mr. Lanier subsequently testified that he and his wife co-own Dixie-Lynn Aerial Photography, and that his wife is the registered owner of a Cessna 172 aircraft, "registration number 87700 Uniform."[7] According to Mr. Lanier, respondent was the only pilot he employed on the days in question, and respondent was the only person, other than himself, who was authorized to pilot the aircraft.[8] According to Mr. Lanier, when he received a letter from the FAA indicating that a complaint had been filed, he contacted respondent. (TR-76). Mr. Lanier gave respondent the name and telephone number of the letter writer, and respondent apparently subsequently told him that he had contacted the FAA. (TR-77). Mr. Lanier concluded from his conversation with respondent that respondent was the pilot of the aircraft on the days in question. (TR-78).

In response to respondent's counsel's questions, Mr. Lanier

[7]Respondent's contention that the discrepancy between Mr. Lanier's recitation of the registration number as "7700U Uniform" rather than "N877OOU," as described by the percipient witnesses, somehow casts doubt on the identification of the aircraft, is frivolous. The aircraft was identified by its type, by its colors, and by its registration number, which is virtually the same as the Laniers' aircraft's registration number. Moreover, this information led Mr. Lanier and respondent to the inescapable conclusion that it was Mrs. Lanier's aircraft which had been observed.

[8]He testified that the keys to Cessna aircraft are interchangeable, and that there have been times when he believes that someone else may have been in his aircraft. However, there was no evidence here that anyone other than respondent operated this aircraft on the days in question.

testified that the aircraft has an altimeter, and that it is accurate. He testified that he had briefed respondent on altitude minimums, and that respondent has a reputation for being honest and is not the kind of person who would deliberately "buzz" someone and disturb the community. Mr. Lanier also recounted a situation where he had once been accused of low-flying, and it turned out that while the photographer was re-loading the camera with film, he had circled overhead, at low speed, and someone had claimed that he was below 500 feet, when he was not. Mr. Lanier surmised that this is what had happened to respondent on the days in question. Finally, Mr. Lanier testified that the camera used in his aircraft had a fixed-focus, and if the aircraft was operated too close to the object being photographed, the photographs would be out of focus. He claims that he has never received any out-of-focus photographs taken in this particular area from any of his photographers.

In the Board's view, respondent fails to articulate any specific prejudice which enured to him because Mr. Lanier's testimony was received by the law judge over the telephone. Mr. Lanier's testimony had little to do with the location of the flights, and respondent does not convince us that there was any need to show this witness documentary evidence which required his presence in the hearing room. While it is true that Mr. Lanier's testimony of his conversation with respondent, in which respondent apparently admitted that he had piloted the aircraft, supports the conclusion that respondent was the pilot in command

at the time of the flights, this testimony is merely cumulative of other evidence in the record, including respondent's answer to the complaint and his own testimony. In any event, Mr. Lanier's veracity was never put in issue. Respondent's counsel did not attempt to impeach him during his questioning. Indeed, respondent's counsel appears to have elicited mostly favorable testimony from the witness.[9] Thus, the law judge's inability to observe Mr. Lanier's demeanor did not prejudice respondent's ability to defend himself.

In sum, the Board concludes that there is sufficient reliable, probative, and credible evidence to support the law judge's finding that respondent was the pilot in command of N8700U on September 13 and 14, 1989, when it was observed by witnesses flying in the area of Hays County, near San Marcos, Texas.

[9]We also reject respondent's claim that he felt "compelled" to take the stand because of Mr. Lanier's testimony, since respondent never disavowed his conversation with Mr. Lanier or his admission to him. In any event, safety enforcement proceedings under section 609 of the Federal Aviation Act of 1958 are civil, not criminal in nature, and an airman may be compelled to testify in these proceedings unless he shows the court that an answer to a particular question may be incriminating. Roach v. NTSB, 804 F.2d 1147 (10th Cir. 1986), cert. denied, 486 U.S. 1006 (1988). In the case at bar, respondent did not claim any Fifth Amendment protections before taking the stand.

Does a preponderance of the evidence establish that respondent operated the aircraft below minimum altitudes?

Three witnesses testified that they observed respondent's aircraft being operated below 500 feet, in the vicinity of their homes. Respondent denies the allegations and disputes the accuracy of their observations. Respondent presented an expert witness who opined that lay witnesses are often 300 to 400 percent off in their estimations of distances, although the expert acknowledged that such observations are more accurate if the lay witnesses use visual references, such as trees.[10] Respondent's counsel successfully cross-examined one witness, Mrs. Green, to the extent that she indicated uncertainty as to the exact altitude of the aircraft she observed. The law judge indicated in his initial decision that he gave little weight to her testimony.[11]

The law judge nonetheless found that another witness, the husband of Mrs. Green, was persuasive in his testimony concerning the altitude of the aircraft which flew over his home. He testified that his house is 25 feet high in the back, and the trees on his property are 25 to 30 feet high. In his opinion, the aircraft was 3 or 4 times higher. Mr. Green also testified

[10]The expert also testified that, typically, lay witnesses overestimate the distances observed.

[11]In our view, the witness' testimony is unwavering on the most critical point -- that the aircraft she observed was at an altitude of less than 500 feet, based on her comparison of the aircraft's altitude to the height of the trees in her back yard.

that they live near a municipal airport and are quite used to having aircraft fly in the area, but none have ever flown at such low altitudes as on this occasion.[12] Mr. Langley, the other homeowner who witnessed the alleged low flight on September 14, 1989, also testified that the aircraft was so low that, at times, it was obscured by trees.

Board precedent is clear that credibility determinations are generally within the exclusive province of the law judge and will not be disturbed in the absence of arbitrariness, capriciousness, or other compelling reasons. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986). Respondent offers us no persuasive reason to disturb the law judges findings in favor of the Administrator's witnesses in this case. The law judge found two of the Administrator's witnesses' estimations of altitude reasonable, based in large part on the fact that both used trees on their properties as visual references, which, as respondent's own expert testified, is a factor which made their estimates more reliable.

Respondent further argues that Mr. Green's testimony should have been disallowed because his counsel was not given timely written notice that Mr. Green would testify. According to the record, the law judge issued a pre-trial order requiring the parties to exchange a list of witnesses and a short statement as to what that witness would testify to, not later than 15 days

[12]The law judge also found it significant that Mr. Green had served as a crewmember aboard Navy aircraft many years ago.

prior to trial. On November 27, 1990, FAA counsel called respondent's counsel, and advised a paralegal of Mr. Green's intended testimony. (TR 12, 13). A letter postmarked November 27, 1990, and admittedly received by respondent's counsel on November 29 (who does not dispute the FAA's telephone conversation with his paralegal), confirmed that information. The hearing was held 14 days later.

Respondent's contention that he was somehow "surprised" by this witness's appearance is incredible. Since Mr. Green's testimony concerned the same event observed by his wife, and his wife had already been deposed by respondent's counsel prior to hearing, we fail to see how he could be surprised by the substance of his testimony. In any event, if respondent was unprepared to cross-examine the witness, or if he could not present rebuttal testimony because he lacked sufficient notice, the appropriate remedy was a continuance. Respondent's counsel was in fact offered a continuance by the law judge, which he declined.

In conclusion, we find all of respondent's claims to be unavailing. The law judge's rulings concerning the admissibility of evidence were not erroneous, and respondent was provided the opportunity to fully litigate the issues. His claims of denial of due process are unsupported by the record.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied;

2. The Administrator's order, as modified by the initial decision, and the initial decision are affirmed; and

3. The 90-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.[13]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[13]For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).